

# A March in the Night

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The annual [Feminist Night March](#) in Istanbul has been the most cheerful, vivid and peaceful demonstration of Turkey's civil society since 2003. Despite the venue restrictions imposed by the government and the use of tear gas during the marches of 2019, the organizers of rallies have scheduled the events to mark the International Women's Day on 8 March 2020. The demonstrations have seen a very high number of participants including feminist NGOs, families of murdered women, and citizens from all ages, but under heightened police presence, blockade, and tear gas. The march is definitely another case study on the civic engagement of human rights defenders in repressive contexts. Complementing the discussions on the endurance and containment of civic activism, the recent *Gezi Park* and *Kavala* cases are conducive for understanding the relationship between human rights defenders and [autocratic legalism](#). These cases are of specific importance for documenting the repressive legal practices against civil society and the endurance dynamics of civic engagement under dissuasive politics.

## The Gezi Park and Kavala cases

On 18 February, the emblematic *Gezi Park* case of Turkey has ended with a verdict of acquittal for nine defendants including a group of professionals that are known for their commitment to civic engagement as businesspersons, lawyers, artists, architects or civil society representatives. They had been indicted for allegedly trying to violently overthrow the government by organizing and financing the *Gezi Park* protests of 2013 in Istanbul (article 312 of the Criminal Code). Although the *Gezi Park* occupation was initially a local demonstration against the construction of a shopping mall at the city center that has little green space, the protests turned into a nationwide backlash against the government after harsh response of the police. *Gezi Park*, the main venue of protests, was marked as a public space of extra-parliamentary opposition. It was a jamboree of civic and creative disobedience via art performances, exhibitions, forums and collective debate. However, due to the use of force and the riots 15 citizens lost their lives. Significantly, after the *Gezi Park* protests the government has intensified its repressions to a point which damaged Turkey's democratic consolidation and Europeanization process.

Yet, hours after the "not guilty" verdict that underlines the lack of evidence against the defendants of *Gezi Park*, the prominent figure of the case, *Osman Kavala*, a businessman and philanthropist who has been accused of being the chief financier and organizational supporter of *Gezi Park* uprisings, was re-arrested. His latest arrest is based on the accusation of his involvement in the attempted coup in July 2016 to overthrow the constitutional order (article 309 of the Criminal Code). The pro-government media called him a ["tycoon with a shady background"](#) or ["Turkish Soros"](#) for his non-profit work with the Open Society Foundation. Besides his

commercial enterprises, *Kavala* has supported developmental projects and policy-based initiatives via think tanks or corporations in the last 25 years.

In fact, *Kavala* was the only defendant of the *Gezi Park* case under arrest while others were either released from detention or tried *in absentia* because they had left the country. The *Gezi Park* protests were brought before the judiciary including the Constitutional Court in a variety of cases as to the casualties and the use of improper and excessive violence by police. Making a distinction between peaceful demonstrators and violent groups taking part in the rioting, the Constitutional Court upheld the claims of applicants who participated in the protests to exercise their constitutional rights peacefully as an essential part of democratic society, but suffered from police violence (see, e.g. *Özge Özgürengin* Application Nr. 2014/5218, 19 April 2018, Official Gazette 4 July 2018-30468; *Ender Ergün* Application Nr. 2016/1849, 19 November 2019). It underlined not only the violation of the prohibition of inhuman or degrading treatment, but the infringement of the right to peaceful demonstrations. In a decision published shortly after *Kavala's* re-arrest on 25 February, the Court has reaffirmed its stance valuing the right to peaceful assembly in *Gezi Park* protests (see *Eda Aysegül Kılıç* Application Nr. 2015/12263, 16 January 2020, Official Gazette 25 February 2020-31050).

*Kavala's* acquittal and quick re-arrest represents a Kafkaesque fiction that is added to the portfolio of the declining rule of law in Turkey. His treatment by the judiciary has been heavily condemned by opposition parties and [human rights organizations](#) as a deliberate and cynical detention. [30 bar associations](#) have called on the Council of Judges and Prosecutors to resign since it has launched a rapid investigation procedure regarding the judges of the *Gezi Park* case soon after President *Erdogan's* harsh criticism of *Kavala's* acquittal. The government's tight political control over judiciary has become a matter of concern once again. Additionally, in *Kavala's* case there have also been [speculations](#) about a battle within the judiciary and the government, between progressive and repressive actors.

## Legalistic strategies of dissuasive effect

The *Gezi Park* and *Kavala* cases represent the account of legalistic strategies of dissuasive effect and how they work in autocratic transitions. Here, criminalization is the main strategy, as observed in the freedom of expression cases. Autocratic legalism uses as devices mainly measures of criminal law, both substantive and procedural, which are supposed to protect the democratic constitutional order and due process of law. In the case of Turkey, regular criminal law norms such as those on overthrowing the government or the constitutional order as well as defamation or libel suits are increasingly the basis for investigations and trials against the opponents that are not politically affiliated with the coup attempt in 2016. The customization of criminal law that becomes operative and flexible according to the needs of autocratic hegemony is a recurrent pattern. Additionally, the lower criminal courts that can be controlled by reshuffling and disciplinary investigations serve as the appropriate agencies of arbitrariness. The trial as a legal process with substantive guarantees is decoupled from the intrinsic values and boundaries of lawfulness including procedural fairness and integrity. Judicial professionalism turns

into bare legal formalism without the quality of justice. Consequently, the lower judiciary becomes a normative automat of autocratic hegemony and has only an instrumental value. On the whole, the injustices are not coherent and predictable, unlike those from the days of military rule in Turkey. In trials against government critics that deal with identical allegations, like in the *Academics for Peace* petition trials, the violations of the right to a fair trial have been strikingly uneven.

## Judicial behavior under autocratic legalism

This inherent uncertainty of autocratic legalism, however, produces a dilemma. First, law is used by the judiciary as a pressure valve to meet the minimum expectations of European supervision as to the effective remedies. Second, courts seem to enjoy some autonomy under specific circumstances like in the *Gezi Park* case. If a majority on the bench rules in favor of liberty, particularly in the supreme judiciary, this eases the tensions with the Constitution and case-law of the European Court of Human Rights. The internal dynamics of progressive judicial behavior need to be further explored. However, courts remain spaces of contestation and thereby destabilize autocratic legalism.

As a reminder, *Kavala's* very long pre-trial detention – more than two years – was not considered unconstitutional by the Constitutional Court (*Mehmet Osman Kavala* Application Nr. 2018/1073, 22 May 2019, Official Gazette: 28 June 2019-30815). Nevertheless, the European Court of Human Rights (ECtHR) in *Kavala v. Turkey* (December 2019) has taken the opposite view and demanded his immediate release. The deference of the lower court to the judgment of the ECtHR on 18 February 2019 represents itself as a legalistic submissiveness to the European supervision that provides an argument for a [rather formal and only a partial compliance](#). Still, the re-arrest undermines the substantive impact of both European supervision and the very recent [judicial reform strategy](#) that was adopted in consultation with the *Council of Europe* and the *EU Commission* with a claim of strengthening human rights and the rule of law. First, *Kavala's* re-arrest is related to an alleged crime regarding the attempted coup investigated simultaneously with the *Gezi Park* allegations. However, *Kavala* has been released on the basis of the disproportionality of his pre-trial detention on 11 October 2019 for this alleged crime. Additionally, the criminal procedural law has been changed on 24 October 2019 by prescribing the upper limit of detentions in line with judicial reform strategy. Therefore, the re-arrest does not even satisfy the [legal standards of the recently adopted domestic law](#) (article 102 of the Criminal Procedural Code). Second, the ECtHR has already reviewed in *Kavala v. Turkey* the allegations as to an attempt to overthrow the constitutional order by force and violence that are the basis of the re-arrest. Considering the nature of the alleged crime, the ECtHR underlined that there should be tangible and verifiable facts or evidence that lead to a reasonable suspicion and these are not present for *Kavala* (para. 154-155).

## Endurance dynamics of civil society

The *Gezi Park* and *Kavala* cases may help to understand the endurance dynamics and constraints of the democratic public as an agent of constitutional democracy under autocratic pressure. These cases document the features of judicial harassment of civil society, particularly human rights defenders. In *Kavala v. Turkey*, the ECtHR considered the correlation between the indictment and public speeches of President *Erdoğan* on *Kavala*'s role in *Gezi Park* demonstrations. In these speeches, *Kavala* has been marked as a terrorist and a financier of riots. Hence, the ECtHR agreed with the submissions of the *Commissioner of Human Rights* that the measures against *Kavala* have an ulterior purpose, are "part of a wider campaign of repression against human rights defenders" (para. 229-232). Significantly, they were likely to have a dissuasive effect on the future work of human rights defenders.

As stated in [the joint report of six human rights NGOs](#) for the *Universal Periodic Review 2019*, the stigmatization and marginalization of human rights defenders has become prevalent in Turkey. They take the form of smear campaigns, defamatory labelling in the media, hostile political speeches by high-profile political figures, threats and intimidation, the use of violence by the police during peaceful demonstrations and physical attacks. Released only one day after *Kavala*'s re-arrest, the *Commissioner of Human Rights* draws attention to the "concerted and continuous pressure exerted on human rights defenders" in form of judicial proceedings as the most worrying practice (para. 166 of her report).

Although only [9 percent of Turkey's population](#) is formally registered in civil society organizations, the civic engagement in unregistered networks in form of informal, single issue, urban or local platforms constantly increases. Formal membership of women in associations is low ([1.65 percent](#)), but the mobilization of women's solidarity networks is strikingly strong. They address governmental policies and judicial decisions reinforcing gender roles and victim blaming, but they are subject to vilification, detention, and judicial proceedings as recently observed with respect to [Las Tesis' performance in December 2019](#). Besides the variations of dissident activism, [pro-government associations of women, family, children or education](#), namely GONGOs, have become empowered actors that collaborate with the public authorities. They are criticized for receiving extensive [financial support for the realization of a socially conservative agenda of the government](#) and feed clientelist politics. Consequently, civil society is subject to either selective repression in the case of human rights defenders or selective empowerment strategies for the GONGOs. Ambiguous legislation and arbitrary practices such as excessive auditing facilitate the containment of civil society actors. [The recent legislative proposal](#) prescribing the notification of personal data of members of associations and their resignations to the provincial governors raises concerns of a shriveling democratic space.

## Conclusion

The genuine human rights defenders are of specific importance among the constituents of civil society that are mostly perceived as the key actors to strengthen the democratic public and constitutional consciousness. This perception reflects the Tocquevillian assumption regarding civil society and its positive democratizing capacity, but there is also a [theoretically negative assumption](#) that civil society activism can strengthen autocratic practices due to overreliance on repression by the ruling elite. Turkey's vivid civic engagement and human rights defenders offer a case to test the role of civil society in a setting of autocratic legalism. At present, it seems essential that civil society should primarily focus on its own institutional resilience including data-driven knowledge building, documentation, human capacity, and associative platforms at the local and national level. As the EU deliberates its strategies and instruments for the neighborhood and development policies post-2020, it is still recommendable to provide a structured program for the resilience of the genuine human rights organizations under [European Instrument for Democracy and Human Rights \(EIDHR\)](#).

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